IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-131

CLIFFORD J. HYNNING, *et al.*,

Petitioners,

v.

GLADYS H. BAKER, *et al.*,

Respondents.

RESPONDENT LOUIS H. BEAN'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

TERRENCE NEY
Boothe, Prichard & Dudley
4085 University Drive
Fairfax, Virginia 22030

Attorneys for Respondent, Louis H. Bean.

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-131

CLIFFORD J. HYNNING, *et al.*,

Petitioners,

v.

GLADYS H. BAKER, *et al.*,

Respondents.

RESPONDENT LOUIS H. BEAN'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent Louis H. Bean submits this Brief in Opposition to the typewritten Petition for Certiorari filed by Petitioners on July 29, 1976. Respondent Bean urges the Court to disregard the printed brief (the content of which varies substantially from the typewritten Petition) subsequently filed by Petitioners in violation of Rule 23(3), RULES OF THE SUPREME COURT OF THE UNITED STATES, which prohibits the filing of a separate brief in support of the Petition. Respondent Bean further urges that the original typewritten Petition for Certiorari be denied for failure to comply with Rule

23(2), RULES OF THE SUPREME COURT OF THE UNITED STATES, which requires that all such petitions be printed in conformity with Rule 39(a), RULES OF THE SUPREME COURT OF THE UNITED STATES. *See, Snider v. All State Administrators, Inc.*, 414 U.S. 685 (1974).

OPINION BELOW

Petitioners seek a Writ of Certiorari to the Supreme Court of Virginia, whose opinion dated April 30, 1976, denied a petition for appeal, and thereby affirmed the judgment of the Circuit Court of Arlington County, dated June 20, 1975.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. §1257(3) (1966). Jurisdiction thereunder depends upon the timely assertion of a substantiai federal question. Respondent Bean submits that Petitioners failed to raise the issue now argued in a timely manner in the state courts, and that, in any event, there is no substantial federal question in this case.

Respondents began this action as a Creditors' Bill in 1972 in the Circuit Court of Arlington County, Virginia, to set aside a transfer by Petitioner Hynning on the ground that it was a fraudulent conveyance under VA. CODE ANN. §55-80 (1974 Repl. Vol.). The circuit court referred the matter to a Commissioner in Chancery, who held hearings, received documentary evidence, and issued an extensive report finding that the transfer was a fraudulent conveyance. There is no indication in the record that Petitioners ever raised before the Commissioner or the Court the issue of whether his ultimate finding denied Petitioners their property without due

process of law in violation of the fourteenth amendment. U.S. CONST. amend. XIV. Petitioners then filed exceptions to the Commissioner's report in the circuit court. Neither the exceptions (Appendix p. 1a) nor a subsequent letter brief filed by Petitioners (Appendix, p.4a) raised the constitutional issues Petitioners now assert. After reviewing the evidence and hearing arguments, the circuit court affirmed the Commissioner's finding that the conveyance was fraudulent.

The Petitioners first raised their constitutional argument in the Notice of Appeal from the circuit court's affirmance of the Commissioner's report. (Appendix, p. 8a, para. 3). Under Rule 5:7, Rules of the Supreme Court of Virginia, the Supreme Court of Virginia was not bound to consider the question of constitutionality. The Supreme Court of Virginia has held that it will not entertain a constitutional argument for the first time on appeal. *Newlon v. City of Alexandria,* 213 Va. 336, 193 S.E.2d 36 (1972).

The Virginia Supreme Court denied the petition for review. The denial had the effect of affirming the circuit court opinion. (Petitioners' Appendix, p. 6a) In the absence of a clear showing that the constitutional issues were considered and decided by the Supreme Court of Virginia, petitioners are now foreclosed from relying upon such issues in order to invoke the jurisdiction of this Court. *Simmons v. West Haven Housing Authority,* 399 U.S. 510, 513 (1970). *Cf., Raley v. Ohio,* 360 U.S. 423, 436 (1959).

Although several opportunities were afforded Petitioners to present their constitutional objections, both at the Commissioner's hearings and in the circuit court, they did not do so. Because the constitutional objections were not raised in a timely manner under Virginia procedure,

they may not now be the basis of this Court's jurisdiction. *Edelman v. California*, 344 U.S. 357, 358-59 (1953). Failure of the Petitioners to comply with state procedures is an adequate and independent state ground on which the decision below should now be allowed to stand. *Edelman v. California, supra.*

QUESTIONS PRESENTED

Whether a *prima facie* case of fraud, based on circumstantial evidence alone produced in an adversary proceeding, amounts to a deprivation of property without due process of law?

Whether Petitioners may now raise questions regarding a state court's adherence to its own procedural rules when such issues were either waived by Petitioners or decided against them in the state courts?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

1. U.S. CONST. amend. XIV, §1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. 28 U.S.C. §1257(3) (1966): State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

3. VA. CODE ANN. §55-80 (1974 Repl. Vol.):

"§55-80. Void fraudulent acts; bona fide purchasers not affected.—Every gift, conveyance, assignment or transfer of, or charge upon, any estate, real or personal, every suit commenced or decree, judgment or execution suffered or obtained and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled to shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void. This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor. (Code 1919, §5184.)

4. Rule 23, RULES OF THE SUPREME COURT OF THE UNITED STATES:

The Petition for Certiorari

* * *

2. The petition for writ of certiorari shall be printed in conformity with Rule 39.

3. All contentions in support of a petition for writ of certiorari shall be set forth in the body of the petition, as provided in subparabraph (h) of paragraph 1 of this rule. No separate brief in support of a petition for writ of certiorari will be received, and the clerk will refuse to file any petition for writ of certiorari to which is annexed or appended any supporting brief.

5. Rule 39, RULES OF THE SUPREME COURT OF THE UNITED STATES:

Form of Appendices, Petitions, Briefs, Etc.

1. All appendices, petitions, motions and briefs, printed for the use of the court must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume, having pages 6 1/8 by 9 1/4 inches and type matter 4 1/6 by 7 1/6 inches, except that appendices in patent cases may be printed in such size as is necessary to utilize copies of patent documents. They and all quotations contained therein, and the matter appearing on the covers, must be printed in clear type (never smaller than 11-point type) adequately leaded; and the paper must be opaque and unglazed. If footnotes are included they may not be printed in type smaller than 9-point.

* * *

6. Rule 5:7, Rules of the Supreme Court of Virginia:

Objections in Trial Courts; Effect of Failure to Assign Error

This court will not notice any objection requiring a ruling of the trial court unless the ground of objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this court to attain the ends of justice. Only errors assigned in the notice of appeal and assignments of error will be noticed by this court and error not so assigned will not be admitted as a ground of a reversal of a decision below.

STATEMENT OF THE CASE

This case began as a Bill to Enforce a Judgment Lien in the Circuit Court of Arlington County, Virginia, brought by Respondent Gladys L. Baker. Other creditors of Petitioner Hynning, including Respondent Bean, intervened and the matter was referred to a Commissioner in Chancery to determine, *inter alia,* whether the conveyance from Hynning (who happens to be a lawyer) to Hynning and his daughter, Petitioner Carol H. Smith,as joint tenants with right of survivorship, was a fraudulent conveyance which should be set aside under VA. CODE ANN. §55-80 (1974 Repl. Vol.) The Commissioner took proof consisting of answers by Hynning to interrogatories as well as documentary evidence. After Hynning indicated in answers to interrogatories that the consideration for the conveyance was the transfer of insurance policies from Smith to Hynning and the cancellation of Hynning's promissory note held by Smith, counsel for Respondent Louis H. Bean sought a *subpoena duces tecum* for the note and insurance policies to be produced.

These documents were not produced and have never been produced. Nor was there offered proof of any kind

that they were ever transferred by Smith to Hynning. The documents produced indicate possession of the note by Smith, but indicate absolutely nothing as to any transfer from Smith to Hynning as consideration for the conveyance. These meaningless documents were transmitted by Petitioners' counsel on September 5, 1974. On September 10, 1974, counsel for Respondent Bean submitted a letter brief to the Commissioner. A hearing was scheduled for September 13, 1974, for the taking of further proof. However, as noted in the Commissioner's report, "[N]o one appeared to put on any further evidence." (Appendix, p.9a). The Commissioner entered his report finding that the conveyance was fraudulent on October 10, 1974.

On December 26, 1974, counsel for Petitioners filed Exceptions to the Commissioner's report in the Circuit Court of Arlington County. (Appendix, p.8a) Counsel for Petitioners stated in paragraph 2 of the Exceptions that "Defendants take no exception to the Commissioner's utilizing the Answers to Interrogatories in arriving at his findings. . . ." (Appendix, p. 2a) No exception states as a ground that the procedure followed by the Commissioner violated Petitioners' constitutional right to due process of law. In a letter brief dated April 22, 1975, to Judge Charles H. Duff of the Circuit Court of Arlington County, counsel for Petitioners again made no mention of any constitutional infirmity in the procedure or conslusions reached by the Commissioner. (Appendix, p. 4a) In a letter opinion dated April 29, 1975, Judge Duff, after a review of the evidence and findings of the Commissioner, and after hearing argument of counsel, affirmed the Commissioner's report. Judge Duff held that the Commissioner's findings were "supported by the totality of the evidence." (Petitioners' Appendix, p. 4a)

An order was entered on June 20, 1975, affirming the Commissioner's report, and a decree of sale postponed pending appeal.

The first mention of constitutional questions occurred in the Notice of Appeal Petitioners filed on July 18, 1975. (Appendix, p. 8a). The Supreme Court of Virginia affirmed without opinion the decree of the Circuit Court on April 30, 1976. (Petitioners' Appendix, p. 6a) A Petition for a Writ of Certiorari was filed on July 29, 1976.

ARGUMENT

I.

DUE PROCESS OF LAW IS NOT DENIED BECAUSE THE PROOF OF FRAUD IN AN ADVERSARY PROCEEDING IS BASED ON CIRCUMSTANTIAL EVIDENCE.

There is no substantial federal question involved in this case; therefore this Court lacks jurisdiction. *Zucht v. King,* 260 U.S. 174 (1922). Whether or not a fraudulent conveyance has taken place has traditionally been considered a matter of local law, not a federal question. *Thompson v. Fairbanks,* 196 U.S. 516 (1905); *Cramer v. Wilson,* 195 U.S. 408 (1904). In the present case, the finding that the conveyance to Petitioners was fraudulent was made only *after* an evidentiary hearing at which Petitioners were represented by counsel and the determination made by a Commissioner, who is also an attorney. Although exceptions were taken by Petitioners, no exception raised an issue of constitutional infirmity, and Petitioners, again represented by counsel, were heard on the issue by a Circuit Judge who affirmed the finding of fraudulent conveyance. They then took an appeal to the Virginia Supreme Court, which, after considering the

record, refused the petition for review. Thus, the issue presented in this case has been thoroughly examined by the courts of the Commonwealth of Virginia. Petitioners have had numerous opportunities to be heard in the state courts on the questions they now raise in this Court. Respondent Bean contends that, in view of Petitioners' failure to fully use these opportunities and in view of the state courts' thorough review, this case is not one in which this Court should disturb the determination of state courts.

This is not a case where no evidence was presented to support the ultimate finding. *Cf. Thompson v. City of Louisville,* 362 U.S. 199, 206 (1960). Rather, considerable evidence was introduced, from which the Commissioner could, and did, reasonably determine that the transfer was a fraudulent conveyance. Where evidence is presented from which the conclusion reached could have been logically drawn, there is no violation of due process of law, and this Court will not second-guess evidentiary findings of state tribunals. *See generally, Wood v. Strickland,* 420 U.S. 308, 323-24, 326 (1975).

This Court should be especially reluctant to second-guess presumptions and conclusions established not by statutes of state-wide application but by judicial inquiries into factual situations.

Nor have Petitioners' rights to due process of law been impaired. The Commissioner's report and the Circuit Court both found that there was ample evidence to raise a *prima facie* case of fraud, and that this evidence was not rebutted by Petitioners. The conveyance was from Hynning to himself and his daughter as joint tenants with right of survivorship. There was no settlement statement, appraisal, valuation, or deed of trust taken for what was alleged to be a transfer for consideration. At the time of

the conveyance there were two unsatisfied money judgments against Hynning outstanding in Arlington County, Virginia, and real estate tax liens against the property. Hynning retained possession of the property after the conveyance. In response to interrogatories from Respondent Bean, Hynning stated that the transfer was for consideration consisting of a promissory note and proceeds of certain life insurance policies, both of which were said to have been transferred from Smith to Hynning. A *subpoena duces tecum* was issued for these documents, but they were never produced. Nor did Smith, a party throughout and one who, by the voiding of the conveyance, lost a present interest in one-half the property and a survivorship interest in the entire property, ever come forward with any evidence regarding the transaction. It is manifest from these circumstances—the relationship of the parties, outstanding judgments at the time of the conveyance, retention of possession by the grantor, and a failure on the part of those in possession of the alleged evidence of consideration to come forward with such evidence—that the Commissioner and circuit court reasonably concluded that the transfer was a fraudulent conveyance.

This Court has in numerous cases upheld as constitutional evidentiary presumptions which create a *prima facie* case of civil liability. See, *e.g., Mobile, Jackson, and Kansas City R.R. v. Turnipseed,* 219 U.S. 35 (1910) (upholding a Mississippi statute making proof of injury by a train *prima facie* evidence of negligence on the part of the railroad), *Anderson National Bank v. Luckett,* 321 U.S. 233 (1944) (upholding a Kentucky statute creating a rebuttable presumption of abandonment of demand bank deposits from the fact of ten years' inactivity). The rule

was succinctly stated in *Adler v. Board of Education of New York City*, 342 U.S. 485 (1952):

> "Where . . . the relation between the fact found and the presumption is clear and direct and is not conclusive, the requirements of due process are satisfied."

342 U.S. at 496. In the present case there was ample factual proof from which the presumption of fraud was clear and direct.

Petitioners cite two cases in support of their constitutional argument, *Bailey v. Alabama*, 219 U.S. 219 (1911), and *Manley v. Georgia*, 279 U.S. 1 (1929). Both involve statutory presumptions of *criminal* fraud. In *Bailey* a state rule of evidence effectively rendered the presumption of fraud irrebuttable. In *Manley* the presumption (that a bank officer or director is guilty of criminal fraud on proof that the bank is insolvent), while rebuttable, was patently unreasonable, especially in light of the fact that under Georgia law at that time banks could loan up to 85 percent of their deposits, making insolvency due to mild panic a very real and frequent possibility bearing no relation to fraudulent conduct.

The present case does not involve blanket statutory presumptions of criminal liability. Rather it is a civil matter in which a logical and reasonable presumption based on evidence was raised against Petitioners in a judicial proceeding and which they failed to refute, although presented many opportunities to do so.

The question involved is inherently one of local law requiring judicial determinations based on factual patterns which will vary from case to case. The issues Petitioners raise have been definitively settled by this Court in several cases. This case has no evidentiary or

logical facets which distinquish it from cases clearly establishing that a reasonable presumption from a proven fact comports with the due process clause of the fourteenth amendment. Therefore, the petition should be denied.

II.

THE ALLEGED FAILURE OF THE VIRGINIA STATE COURTS TO FOLLOW VIRGINIA LAW DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The question of whether the Virginia courts have followed their own rules, in the absence of a constitutional infirmity resulting from their failure to do so, is strictly a matter of Virginia law and has been decided against Petitioners after thorough review in the Virginia courts. It is not now subject to review in this Court. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).

In support of their argument on this point Petitioners cite *Vitarelli v. Seaton*, 359 U.S. 535 (1959), a case which has nothing to do with constitutional questions, but rather holds that, as a matter of federal law, certain *federal* statutes must be complied with. Petitioners make no argument (apart from that discussed in Part I of this Argument) that the alleged failure of the Virginia courts to follow their own rules and authorities has resulted in the denial of their constitutional rights. Their right to compliance is, therefore, a question of state law for the Virginia courts alone. There is no substantial federal question presented. *Murdock v. City of Memphis, supra.*

CONCLUSION

For the reasons stated, Respondent Louis H. Bean submits that Petitioners did not raise the constitutional issues in a timely manner in the state courts. Additionally, the questions presented here inherently concern local law and turn on the particular facts in this case. Finally, on the merits of the case, at least three Virginia tribunals have found against Petitioners. Thus, Petitioners have not been deprived of their property without due process of law. Lastly, no substantial Federal question is presented by this petition.

As a result, the Petition for Certiorari should be denied and the decision of the Supreme Court of Virginia allowed to stand.

Respectfully submitted,

TERRENCE NEY
Boothe, Prichard & Dudley
4085 University Drive
Fairfax, Virginia 22030
Attorneys for Respondent, Louis H. Bean.

APPENDIX

APPENDIX

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

GLADYS L. BAKER,	)	
	)	
Complainant	)	
	)	IN CHANCERY
vs.	)	NO. 23183
	)	
CLIFFORD J. HYNNING, et. al.	)	
	)	
Defendants	)	

EXCEPTIONS TO COMMISSIONER'S REPORT

COME NOW the Defendants, Clifford J. Hynning and Carol H. Smith, by counsel, and file herewith their exceptions to the Commissioner's Report, returned herein on December 17, 1974, giving notice that said Defendants intend to present to this Court the following exceptions and objections and argue that the said Report should be disapproved and the findings of fact and conclusions of law therein be reversed:

1. Defendants except to the finding on page 9 of said Report that the Answers to Interrogatories filed by counsel on behalf of Defendant Hynning were incomplete and evasive; Defendants state affirmatively that counsel for Louis H. Bean, who filed the subject interrogatories, made no motion to compel discovery under Rule of Court 4:12(3) on the ground that said answers were incomplete and evasive and such objection is therefore waived.

2. Defendants take no exception to the Commissioner's utilizing the Answers to Interrogatories in arriving at his findings, but take exception to the fact that the Commissioner utilized certain of the Answers and refused to consider other Answers in arriving at his findings; specifically, the Commission refused to consider the Answer to Interrogatory 4 relating to the consideration paid by Carol H. Smith in the acquisition of her interest in the property which is the subject matter of this cause.

3. Defendants except to the finding of the Commissioner, on pages 9 and 10 of said Report, that Defendant Hynning failed to produce sufficient evidence of consideration received by him for the transfer of the subject property by him to himself and his daughter.

4. Inasmuch as same has influenced the Commissioner's findings of fact and conclusions of law, Defendants except to the finding of the Commissioner, on page 10 of said Report, that Defendant Carol H. Smith has failed to appear in this matter, which finding is internally inconsistent with the Commissioner's finding that Craol H. Smith is represented by counsel, which counsel has appeared in this matter.

5. Defendants except to the findings of the Commissioner, beginning on page 10 of said Report, that a *prima facie* case of fraud has been established by the evidence.

6. Defendants except to the finding and ruling of the Commissioner, on pages 10 and 11 of said Report, that the deed from Clifford J. Hynning to Clifford J. Hynning and Carol H. Smith, as joint tenants with common law right of survivorship, dated September 9, 1971, is a void and fraudulent conveyance as defined by Section 55-80, 1950 Code of Virginia, as amended.

7. Defendants except to the finding of the Commissioner, on page 11 of said Report, that Gladys L. Baker

and Louis H. Bean are entitled to have the whole of the property which is the subject matter of this cause sold to satisfy the claims of all lien creditors.

8. Defendants except to the finding of the Commissioner, impliedly made on page 4 of said Report, that the mere existence of an outstanding obligation gives a creditor the right to challenge a conveyance made prior to the time that such obligation has been adjudged valid by the appropriate Court of record and reduced to judgment.

Respectfully submitted,

CLIFFORD J. HYNNING
CAROL H. SMITH
By Counsel

BARHAM, RADIGAN AND SUITERS
2009 North 14th Street, Suite 410
Arlington, Virginia 22216

By: /s/ Frank E. Brown, Jr.
Frank E. Brown, Jr., Counsel for
Clifford J. Hynning and Carol H. Smith

[Certificate of Service Omitted in Printing]

April 22, 1975

The Honorable Charles H. Duff
Judge, Circuit Court of Arlington County
Arlington County Courthouse
Arlington, Virginia 22201

re: Baker v. Hynning
In Chancery No. 23183

Dear Judge Duff:

Further to the arguments made before your Honor in the above-styled case on April 21, 1975, I feel it necessary that some elaboration be made with regard to the $22,000 note, made by Clifford J. Hynning and payable to his wife, Martha Hynning, which has been identified in the Interrogatories as part of the consideration for the transfer of an interest in the real estate in question to Mrs. Smith.

As stated in the Court, and previously to other counsel, the original of the note cannot be located. Consequently, neither counsel nor the Defendants can make any positive representation as to its whereabouts; however, counsel would suggest that it is certainly not uncommon for a paid note to be destroyed, as such is the most effective means of cancellation.

Counsel for the Defendants, in response to the Subpoena *duces tecum*, stated that the original note could not be found (counsel originally believed that Mrs. Smith had the note, but this was in error and was corrected by Mr. Hynning). However, as evidence that the note did, in fact, exist, counsel cited Mr. Ney and the Commissioner to the official public records of the Circuit Court of Arlington County, which counsel contends are before the Court and properly the subject of judicial

notice. A copy of my letter to Mr. Ney, dated September 5, 1974, is attached hereto.

For the benefit of the Court and other counsel, the following specific information is supplied from said records:

1. The Will of Martha H. Hynning is found in Will Book 53 at page 243 and specifically recites possession of a note in the amount of $22,000, made by Mr. Hynning and secured by deed of trust on 3700 North Military Road, dated July 28, 1960. The note was bequeated to Mrs. Smith in trust. A portion of that trust was supplied to counsel for Mr. Bean in my letter of September 5, 1974.

2. An appraisal of the estate of Martha Hynning appears in Fiduciary Settlement Book 0-3 at page 384 and shows as an asset of the estate a note made by Clifford Hynning in the amount of $22,000. The estate appraisers certifying that entry were L. Lee Bean, Stefan C. Long and Isabel C. Mackey.

3. I attached herewith the relevant schedules of the Virginia Inheritance Tax Return for the estate of Martha H. Hynning showing, in schedule F, the note in the amount of $22,000, and in schedule K, that Carol Smith (then Hynning) was sole beneficiary of the estate. I also attach the Memorandum of Inheritance Tax from the Department of Taxation showing the total amount of the estate, and particularly showing that the value of the note was included as a taxable asset. This information appears in Fiduciary Settlement Book 4 at page 28.

In view of the above, Defendants reinterate their argument that ample proof of the existence of this note is and has been a matter of public record, and that the

inability to produce the original of the note in no way justifies an inference that same never existed.

Very truly yours,

Frank E. Brown, Jr.

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

GLADYS L. BAKER, Complainant	)	IN CHANCERY NO. 23183
vs.	)	
CLIFFORD J. HYNNING, et. al. Defendants	)	

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

NOTICE OF APPEAL

COME NOW the Defendants, CLIFFORD J. HYNNING and CAROL H. SMITH, by counsel, and hereby give notice to all parties that they will appeal to the Supreme Court of Virginia for a review and reversal of the judgment herein entered by the Honorable Charles H. Duff, Judge of the Circuit Court of Arlington County, Virginia, on June 20, 1975, and further giving notice that the errors hereinafter set forth are hereby assigned and will be relied upon in the Petition for Appeal.

THIS NOTICE is given and filed with the Clerk of the Circuit Court of Arlington County, Virginia in accordance with Rule 5:6 of the Rules of the Supreme Court of Virginia now in force.

The Interrogatories of Complainants to Defendants, and the exhibits produced in response to a subpoena *duces tecum* will become part of the Record in accordance with Rule 5:9 of the Rules of Court.

ASSIGNMENTS OF ERROR

The errors hereinafter mentioned are hereby assigned as follows:

1. The Court erred in holding that requested attorney's fees in the amount of $2,000, payable to James H. Simmonds, Esquire, were reasonable.

2. The Court erred in sustaining the following findings made by the Commissioner:

A. That the Deed from CLIFFORD J. HYNNING to CLIFFORD J. HYNNING and CAROL H. SMITH, as joint tenants with common law right of survivorship, dated May 9, 1971, is void and fraudulent as defined by §55-80, Code of Virginia, 1950, as amended.

B. That a *prima facie* case of fraud had been established by the evidence.

C. That the burden was on Defendant Hynning to produce evidence to sustain the transfer of the subject property.

D. That Defendant Hynning failed to produce sufficient evidence of consideration received by him for the transfer of the subject property by him to himself and his daughter.

E. That the Answers to Interrogatories filed by Defendant Hynning were incomplete and evasive.

F. That since the Answers to Interrogatories filed by Defendant Hynning were not under oath, they would be considered only as "admissions against interest."

3. The Court erred in sustaining a finding of fraud without an evidentiary hearing on the record in violation of Article I, Section 11 of the Constitution of Virginia and Amendment 14 of the Constitution of the United States.

Respectfully submitted,

CLIFFORD J. HYNNING and
CAROL H. SMITH By Counsel

[Excerpts from Report of Commission in The Circuit Court of Arlington County, Virginia, Chancery No. 23183]

Pursuant to a Decree of Reference entered May 24, 1974, whereby the said cause was again referred to the undersigned Commissioner in Chancery who was directed to inquire and report as follows:

(a) Upon those matters contained in the Decree of Reference previously entered in this cause; and

(b) To ascertain and report whether all parties of interest are properly before the Court; and

(c) To ascertain and report to the Court whether the conveyance of an interest in the subject property from CLIFFORD J. HYNNING to CAROL H. SMITH should be set aside as being contrary to Section 55-80, 81 of the Code of Virginia.

Pursuant to said Decrees and after Notice of the taking of depositions having been given to all parties who had filed Answers or otherwise appeared in this cause, a copy of said Notices being filed herein, your Commissioner did proceed at his office at 2060 North 14th Street, Arlington, Virginia, on November 14, 1973 at 10:30 o'clock A.M., there being present FREDERICK J. HARLFINGER, Defendant, JOHN NINIAN BEALL, Counsel for Complainant, FRANK E. BROWN, JR., Counsel for CLIFFORD J. HYNNING, Defendant, and was completed at a hearing at his office on August 27, 1974, at 10:00 o'clock A.M., when your Commissioner proceeded to take additional testimony provided by the parties touching the matters of inquiry before him reducing their examination to writing in the form of depositions, there being present at the hearing, FRANK J. [p. 2] SANDO, Counsel for Ulysses G. Auger, Intervenor; R. TERRENCE NEY, Counsel for Louis H. Bean, Intervenor; JAMES H. SIMMONDS, Counsel for Frederick J. Harlfinger, Defendant; JOHN NINIAN BEALL, Counsel for Gladys L. Baker, Complainant; and FRANK E. BROWN, JR., Counsel for Clifford J. Hynning and Carol H. Smith, Defendants.

Your Commissioner reports that by agreement of Counsel for all present this cause was continued to September 13, 1974 at 2:00 o'clock P.M. for taking any further depositions. Your Commissioner reports that at that time and date no one appeared to put on any further evidence. Your Commissioner returns said depositions and exhibits which are made a part of the report and begs leave to report the following matters: [p. 3]

* * *

ITEM FIVE

Your Commissioner finds from the evidence and from his examination of the land records of Arlington County, Virginia, that at the time the Defendant, CLIFFORD J. HYNNING, conveyed the [p. 8] above described property to himself and his daughter, CAROL J. SMITH, as joint tenants with the common law right of survivorship, by deed dated September 9, 1971 and recorded September 17, 1971 in Deed Book 1765 at page 497 of said Arlington County, Virginia, land records, that in addition to the two said deeds of trust against the said property, there was a judgment against CLIFFORD J. HYNNING obtained by ULYSSES G. AUGER in the sum of $8,600.00 docketed in the Clerk's Office of Arlington County, Virginia, on May 11, 1971 in Judgment Lien Docket Book 103 at page 186. Reference is made to the said judgment more particularly described in ITEM TWO (d) of this report.

Your Commissioner further finds that most of the judgment lien creditors listed in ITEM TWO of this report obtained judgments against MR. HYNNING on obligations that were in existence at the time of the execution of the aforesaid deed. There were also outstanding real estate taxes due on the aforesaid property.

Your Commissioner further finds that an order was entered in this cause on May 24, 1974, directing CLIFFORD J. HYNNING to answer in writing and under oath the interrogatories submitted to him by LOUIS H. BEAN, Intervenor, on or before July 10, 1974. Your Commissioner further finds that the said answers to interrogatories were filed on June 20, 1974 by Counsel for CLIFFORD J. HYNNING and were not under oath as directed by Court; however, your Commissioner con-

siders them as admissions against interest and found that they were incomplete and evasive.

Your Commissioner further finds that there was no settlement statement made to show this transfer and no appraisal was done on the property to show the valuation. Your Commissioner further finds that the said CLIFFORD J. HYNNING failed to produce [p. 9] sufficient evidence of consideration received by him for the transfer of this property by him to himself and his daughter; namely, a $22,000.00 promissory note and certain insurance policies aggregating $20,000.00 as directed in the *Subpoena Duces Tecum* issued by the Clerk of the Court on August 22, 1974.

Your Commissioner further finds that the said CLIFFORD J. HYNNING is still in possession of the said property and that his daughter, CAROL HYNNING SMITH, has failed to appear or offer evidence, although she is represented by the same Counsel who represents MR. HYNNING.

Your Commissioner is of the opinion, based on the evidence, that the evidence shows a *prima facie* case of fraud and the burden shifts to the upholder of the transaction to establish its fairness. This he has failed to do. Nearly all of the badges of fraud are present in this case. Fraud can be clearly inferred from the facts and circumstances involved here that MR. HYNNING has attempted by this conveyance to hinder, delay and defraud his creditors by wrongfully withdrawing his property from the reach of the said creditors.

Your Commissioner further finds from his examination of the title and from all of the evidence presented in this cause, including MR. HYNNING'S admission and his failure to admit certain facts through his interrogatories, that the deed from CLIFFORD J. HYNNING to CLIF-

FORD J. HYNNING and CAROL H. SMITH, as joint tenants with the common law right of survivorship to the survivor of either of them, dated September 9, 1971 and recorded September 17, 1971 [p. 10] in Deed Book 1765 at page 497 among the said County land records is a void and fraudulent conveyance as defined by Section 55-80 of the Code of Virginia, and that the Complainant, GLADYS L. BAKER, and Intervenor, LOUIS H. BEAN, are entitled to have the whole property sold to satisfy the lien creditors as set forth in ITEM TWO of this report. Your Commissioner adopts as his memorandum of the law in this case TERRENCE NEY's letter dated September 10, 1974, filed herein. [p. 11]

* * *

/s/Iverson H. Almand
Iverson H. Almand
Commissioner in Chancery
